



**In the Matter of the Request for Opinion
Concerning the Conduct of JoAnn Malone,
former White Pine County Clerk, White Pine
County, State of Nevada,
a public officer,**

Request for Opinion No.: 10-81C

Subject.

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION

The Executive Director bases the following report and recommendation on staff's consideration and investigation of the Third-Party Request for Opinion ("RFO") filed regarding the conduct of JoAnn Malone, former County Clerk, White Pine County, Nevada, a public officer, and on her counsel's written response to the RFO, both attached as exhibits to this report and recommendation, and the other exhibits attached hereto. The Executive Director provides her Report and Recommendation and its exhibits for the consideration of the two-commissioner investigatory panel ("Panel"), pursuant to NRS 281A.240.

Facts:

JoAnn Malone served as the County Clerk of White Pine County in Ely, Nevada. The Clerk's office employed several Deputy Clerks, including Linda "Lin" Burleigh, who filed her candidacy for the County Clerk position to run against her employer, the incumbent. At the Clerk's office, the candidates had a stressful working relationship during the campaign, resulting in Burleigh making several rather public attacks on Malone's actions and ethics. Malone issued an internal memo, barring both herself and Burleigh from giving out or accepting voter registrations, presumably while acting as employees of the Clerk's office, to avoid any appearance of impropriety. However, the memo was entirely ambiguous, and subject to several interpretations.

After Burleigh requested voter registration forms to take along while walking precincts and Malone refused to allow her access to them, the Secretary of State's office became involved and the matter was handled. However, while on a leave of absence, Burleigh came into the clerk's office and requested and received additional voter registration forms. For this act, she was disciplined and placed on leave for insubordination for violating the policy expressed in the memo. The punishment was implemented through the County's Human Resources Director. Prior to the election, she was terminated for insubordination.

Then, Malone voluntarily quit her position as Clerk prior to the election to avoid an appearance of impropriety in light of Burleigh's claim that she campaigned on County time.

Allegations:

Burleigh alleges that Malone used her position in government to further her personal interest in reelection by having Burleigh fired, failed to adequately separate her personal interests from her private commitments, and used County time and resources to further her private business interests during paid office hours.

Nevada Revised Statutes (NRS) and case law:

The applicable statutes are **1) NRS 281A.020, 2) NRS 281A.400(1), 3) NRS 281A.400(2), 4) NRS 281A.400(7), 5) NRS 281A.400(9).**

1. NRS 281A.020(1)(b);(2)(b) Commitment to avoid conflicts;

1. It is hereby declared to be the public policy of this State that:
 - (b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.
2. The Legislature finds and declares that:
 - (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

The allegation is that Malone failed to avoid conflicts between her private interests and those of the general public whom she served. It is alleged that Malone used her position to discredit and terminate the employment of her opponent, Burleigh during the campaign cycle for the November 2010 Election. (RFO, Tab A. pp. 1-4).

Malone responds that an insubordinate employee was handled in the manner provided for under the employment laws, and that her actions regarding Burleigh were not motivated by her status as a candidate.

Burleigh also alleged that Malone failed to keep regular office hours although she accepted a full-time salary, instead spending much of her time managing The Big Apple Restaurant in which she holds an ownership interest, during office hours.

Malone responds that the statutes allow her to delegate office coverage duties to her deputies, so long as they are competent, which she did.

2. NRS 281A.400(1) A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

A violation of NRS 281A.400(1) does not appear to be supported by any credible evidence and it appears that staff marked this statute as an allegation in the Notice to Subject inadvertently.

3. NRS 281A.400(2) A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

The allegation is that Malone used her office to grant unwarranted privileges, preferences and advantages to herself, when she suspended and subsequently terminated the employment of her opponent, and subordinate, Lin Burleigh during the course of campaigning for the November 2010 Election. Burleigh alleged that after Malone learned Burleigh had filed against her, she became hostile, arranged Burleigh's suspension via HR Director LaVerne Bohn (Response to RFO, Tab C, pp. 12-14), and then terminated her employment. (RFO, Tab A. pp. 1-4).

Malone admittedly used her position to issue an internal memorandum that prevented both Burleigh and Malone from distributing or accepting voter registration forms. The Executive Director found the memo to be extremely ambiguous, as it might have been written more specifically to prohibit either candidate from handling registration forms as service providers in the Clerk's Office. However, Malone applied the memo to prohibit the women from gaining access to forms as citizens or as candidates, and from receiving them from a member of the public as candidates - - while not serving in the capacity of Clerk or Deputy clerk - - outside of the office. (RFO, Tab A, pp. 1-2 and 9). During a leave of absence from work, when Burleigh requested forms, Malone refused. A few days later, when she requested them from another Clerk's office employee and received them, Malone took steps to discipline Burleigh via the HR Director for the County for failure to follow the directive in the inter-office memo. Because the scope of the internal memo appears to go beyond Malone's authority as Clerk, she may be viewed as having used her position in government to seek an unwarranted benefit - preventing Burleigh from registering voters who may support her candidacy.

4. **NRS 281A.400(7)** Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

The allegation is that Malone used government time by her constant absence from the Clerk's office to collect full-time salary while she attended to her personal business as part-owner of Ely's Big Apple Restaurant. Burleigh and fellow Clerk's office employee Nichole Baldwin (Baldwin) both stated that Malone worked only a few

hours a week and collected a full salary and all the Clerk's office work was performed by her deputies. (Statement of Nichole Baldwin, Tab D, Exhibit 1). However, it appears that such attendance by elected public officers is contemplated in the statutes, so long as the Clerk's office maintains statutorily mandated office hours staffed by competent deputies. Therefore, this allegation may not implicate NRS 281A at all.

5. NRS 281A.400(9) A public officer or employee shall not attempt to benefit the public officer's or employee's personal or financial interest through the influence of a subordinate.

Finally, Burleigh alleged that Malone used her position [influenced Burleigh as her subordinate] to benefit her personal interest in being reelected as the White Pine County Clerk with the assistance of Human Resource Director LaVerne Bohn, when she issued an internal memo regarding voter registrations and then used it to suspend and subsequently terminate Burleigh. (Response to RFO, Tab C, pp. 12-14), (RFO, Tab A. pp. 1-4).

NAC 281A.435 Basis for finding by panel; unanimous finding required for determination that no just and sufficient cause exists. (NRS 281A.290)

1. A finding by a panel as to whether **just and sufficient cause** exists for the Commission to render an opinion on an ethics RFO **must be based on credible evidence.**

2. A finding by a panel that no just and sufficient cause exists for the Commission to render an opinion on an ethics RFO must be unanimous.

3. As used in this section, **"credible evidence" means the minimal level of any reliable and competent form of proof** provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, **that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion.** The term does not include a newspaper article or other media report if the article or report is offered by itself.

Conclusion and Recommendation:

I recommend that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission render an opinion regarding whether Malone violated NRS 281A.020, NRS 281A.400(1) and NRS 281A.400(7) as a minimal level of credible evidence to support these allegations was not found.

With regard to just and sufficient cause to forward the alleged violations of NRS 281A.400(2) and NRS 281A.400(9) to the Commission for the rendering of an opinion, I recommend that the Panel determine that sufficient credible evidence **EXISTS** to support the allegations.

None of the other allegations included in RFO 10-81C are within the Commission's jurisdiction, and therefore they are not addressed herein.

I respectfully provide my recommendation to this honorable panel.

Caren Jenkins, Esq.
Executive Director

Date: _____